(22,059)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 228.

EDWARD QUIGLEY McCAUGHEY AND GEORGE JOSEPH McCAUGHEY, MINORS, BY THEIR GUARDIAN, SUSAN McCAUGHEY, ET AL., PLAINTIFFS IN ERROR,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1912.

a In the Supreme Court of the State of California.

L. A. No. 1967.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants.

Transcript of the Record.

Appeal from Superior Court of the County of Santa Barbara, Hon. J. W. Taggart, Judge.

McNutt & Hannon, Los Angeles, Cal., and Wm. G. Griffith, Santa Barbara, Cal., Attorneys for Plaintiffs.

B. F. Thomas, Santa Barbara, Cal., Attorney for Defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce.

W. P. Butcher, Santa Barbara, Cal., Attorney for Defendants Mae Morton and J. S. Morton.

H. J. Finger, Santa Barbara, Cal., in propria persona.

Filed Sept. 21, 1906.

FRANK C. JORDAN, *Clerk*,
By R. L. DUNLAP, *Deputy Clerk*.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the County of Santa Barbara, State of California.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants.

Amended Complaint.

The above named plaintiffs, Edward Quigley McCaughey and George Joseph McCaughey, by Susan McCaughey their

Guardian, and Ann Elizabeth McCaughey and John Peter
2 McCaughey, for an amended complaint herein, complain and allege as follows:—

(1) The plaintiffs are the children and sole heirs of George McCaughey, who died intestate in the said County of Santa Barbara on the first day of March, 1890, and of said Susan McCaughey, his widow, who was duly appointed their general guardian by an order of the said Superior Court of Santa Barbara County, of date the 28th day of August, 1897, and has duly qualified and is acting as such. The said plaintiff Ann Elizabeth McCaughey became of lawful age, to wit: of the age of eighteen years, on the 29th day of October, 1900, and the said plaintiff John Peter McCaughey became of lawful age, to wit: of the age of twenty-one years, on the fourth day of April, 1905, and said Edward Quigley McCaughey and George Joseph McCaughey are Minors. The defendant J. S. Morton is the husband of the defendant Mae Morton, and the defendant Mervin C. Faulding is the husband of the defendant Emma J. Faulding.

(2) The said George McCaughey died, as aforesaid, intestate and seized in fee and possessed of a tract of land situated, lying and being in the City of Santa Barbara, County of Santa Barbara and State of California, and bounded and described as in the mortgage and judgment hereinafter set forth: which property
3 was community property, and thereupon, the said plaintiffs as the only children and heirs at law of the said deceased, became seized in fee of an undivided one-half (½) of said land, and ever since have been and now are so seized and the owners in fee simple thereof.

(3) The said George McCaughey in his lifetime, to wit, June 6th, 1889, executed and delivered to the defendant, Henry J. Finger, his note and mortgage in the words and figures following, to wit:—

"This indenture, made the sixth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, between George McCaughey of the City and County of Santa Barbara, State of California, the party of the first part, and H. J. Finger, of the same place, the party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred dollars, gold coin of the United States of America, to him in hand paid, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm, unto the said party of the second part, his heirs and assigns forever, all that certain lot, piece or parcel of land, situate, lying and being in the City and County of Santa Barbara, State of California, and bounded and particularly described as follows, to wit:—

Part of City Block 250 as per official map of the City of Santa Barbara, viz: Beginning at a point on the Northwest line of
4 Gutierrez Street, sixty feet Northeasterly from the South corner of said Block 250, thence along Gutierrez Street Northeasterly 257 feet to a stake, thence at right angles Northwesterly along the Southwest boundary line of lands formerly owned by

(and occupied by) Charles Brown 254½ feet to a stake, thence at right angles Southwesterly along the boundary line of land owned and occupied by R. Forbush 155 feet to a stake, thence Southeasterly along the boundary line of lands formerly owned by Pablo Vasquez 167½ feet to the Northerly corner of lands granted to the party of the first part herein by Lyman Alexander on June 15th, 1875, by deed recorded in the Recorder's office of Santa Barbara County in Book "p" of Deeds at page 3, thence at right angles Southwesterly 126 feet to the Northeasterly line of Chapala Street, thence along Chapala Street 45 feet, thence at right angles into said Block 60 feet, thence at right angles forty-five feet to the place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof.

To Have and to Hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

This Conveyance is intended as a mortgage to secure the payment of a certain promissory note in words and figures, to wit:

5 $500.00. 'SANTA BARBARA, *June 6th,* 1889.

For value received, on the 6th day of February, 1890, I promise to pay to the order of Henry J. Finger, five hundred dollars, gold coin of the United States with interest from date at the rate of ten per cent per annum, provided this note is paid in full at maturity. But if not paid at maturity, then it shall bear interest at the rate of twelve per cent per annum from its date until paid and if the interest is not paid at the end of one year from date it shall become a part of the principal and bear twelve per cent interest per annum.

GEO. McCAUGHEY.

And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of (the) said principal or any installment of interest as provided, then the whole sum of principal and interest shall be due at the option of the said party of the second part, or assigns; and suit may be immediately brought and a decree be had to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, although the time for payment of said principal sum may not have expired, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees at the rate of twelve per cent upon the amount which may be found to be due for principal and interest, by the said decree, and also the amounts
6 both principal and interest, of all such payments of liens or other incumbrances, as may have been made by said party of the second part, by reason of the provisions hereinafter given, and the overplus, if any there be, shall be paid by the party making

such sale, on demand, to the said party of the first part, his heirs, executors, administrators or assigns.

And it is hereby agreed, that it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to pay and discharge at maturity, all liens or other incumbrances, now subsisting or hereafter to be laid or imposed upon said lot of land and premises, excepting for taxes or other assessments, levied or assessed upon this mortgage, or upon the money secured hereby, and which may be in effect a charge thereupon; and such payments shall be allowed, with interest thereon at the rate of twelve per cent per annum; and such payments and interest shall be considered as secured by these presents, and shall be a charge upon said premises, and shall be repayable on demand, in the same kind of money or currency in which the same may have been paid, and may be deducted from the proceeds of the sale above authorized.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

GEO. McCAUGHEY. [SEAL.]

STATE OF CALIFORNIA,
County of Santa Barbara, ss:

7 On this 6th day of June, in the year one thousand eight hundred and eighty-nine, before me, Louis G. Dreyfus, Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared George McCaughey, known to me to be the person described in, whose name is subscribed to and who executed the within instrument, and he acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand, and affixed my official seal, at my office in the said County of Santa Barbara, the day and year in this certificate first above written.

[NOTARIAL SEAL.] LOUIS G. DREYFUS,
Notary Public.

Filed for record at the request of Jas. L. Barker June 6th, A. D. 1889, at 35 min. past 4 o'clock, p. m., and recorded in Vol. W. of Mtgs., page 505, Santa Barbara County Records.

C. A. STEWART, *Recorder,*
By C. J. MURPHY,
Deputy Recorder.

Filed M'ch 11th, 1895.

F. C. BRADLEY, *Clerk.*"

(4) Afterwards, and after the death of said George McCaughey by an order of the Superior Court of said County, duly given and made on the 5th day of April, 1890, the said Susan McCaughey was appointed administratrix of the estate of said George McCaughey, and thereafter, to wit, on the 7th day of April, 1890, duly qualified as such administratrix, and letters of administration were
8 duly issued to her by the said Court; which letters have not been revoked, and the said Susan McCaughey at all the times

hereinafter named, continued to be the duly appointed, qualified and acting administratrix of said deceased.

(5) Thereafter, to wit, on or about the 31st day of January, 1894, the said defendant, Henry J. Finger, who still remained the owner and holder of said note and mortgage, filed his complaint in this Court against the said Susan McCaughey, administratrix of the estate of said George McCaughey, deceased, setting up and alleging therein, the execution of said note and mortgage which were made part of the complaint; the death of said George McCaughey at the date aforesaid; the appointment and qualification of said Susan McCaughey as the administratrix of his estate, and describing the mortgaged premises by *meets* and bounds as hereinabove set forth; and further alleging that there was paid on the said promissory note, on the 18th day of October, 1893, the sum of $150.00, and that no other money had at any time been paid thereon. The Complaint further alleged that at the time of said payment, there was due a total sum of $820.75; leaving due, after said payment had been credited, the sum of $670.75 with interest thereon at the rate of
12% per annum from the 18th day of October, 1893; which
9 still remained due and unpaid "from said defendant Susan
McCaughey as said administratrix, to said Henry J. Finger;"
and also that the claim of the said Henry J. Finger duly made out, on the said note and mortgage for the said sum of $500.00 and the interest due and to become due thereon, at the rate of 12% per annum, was duly presented by him to said administratrix on the 23d day of April, 1890, and allowed by said administratrix and approved by the Judge of said Court; and the Complaint prayed judgment against said defendant, Susan McCaughey as said administratrix, for the sum of $675.75 gold coin, with interest thereon at the rate of 12% per annum from the 18th day of October, 1893, and for costs of suit and counsel fees, at the rate of 12% upon the amount found due and for the foreclosure of said mortgage and the sale of said premises according to law. And thereafter, summons was issued upon said complaint and served upon the said defendant Susan McCaughey as administratrix as aforesaid, on the 22nd day of January, 1895, at the County aforesaid. And the said defendant failing to answer the complaint, her default was duly entered.

(6) That thereafter, to wit, on the 11th day of March, 1895, Judgment was entered upon said default for the foreclosure
10 of said mortgage, and the sale of the mortgaged premises; which Judgment was in the words and figures following, to wit:

Decree of Foreclosure and Sale.

(Title of Court and Cause.)

This cause came on regularly to be heard in open Court on the 11th day of March, 1895, A. E. Putman, Esq., appearing for plaintiff, and no one appearing for or on behalf of the defendant.

The Court having heard all the evidence and proofs produced herein, and duly considered the same, and being fully advised in

the premises, and it appearing therefrom to the satisfaction of the Court,

Firstly. That Susan McCaughey, the above named defendant, has been duly and regularly summoned to answer unto the Plaintiffs' Complaint herein and has made default in *the* behalf and that the default of said defendant for not appearing and answering unto Plaintiffs' Complaint has been duly and regularly entered herein;

That on the 1st day of March, 1890, said George McCaughey died intestate in said County of Santa Barbara, State of California; that by order of this Court April 5th, 1890, said Susan McCaughey was duly appointed administratrix of the Estate of said George
11 McCaughey, deceased, and duly qualified and received her letters as such April 7th, 1890, and that the same have not been revoked. That plaintiff duly presented his claim in writing for the amount of principal and interest due on the note which is the subject of this action mentioned in the complaint, to said Susan McCaughey, administratrix of the Estate of said George McCaughey deceased as aforesaid, duly supported by the affidavit of said plaintiff as required by the Statute in such cases made and provided, together with a copy of said promissory note written therein and due reference to the said Mortgage made as mentioned in the Complaint herein, and said claim was allowed by said administratrix and approved by the Judge of said Court.

Second. That on the 3rd day of February, 1894, the Plaintiff herein caused to be filed and recorded in the office of the County Recorder of the County of Santa Barbara, a notice of the pendency of this suit, containing the names of the parties thereto, the object thereof, and also a true and correct description of the lands and premises affected thereby.

Third. That there is now due and owing to the Plaintiff, H. J. Finger, from the defendant, Susan McCaughey, as administratrix of the Estate of George McCaughey, deceased, upon the promis-
12 sory note and for money expended under the terms of said mortgage, as set forth and described in Plaintiff's Complaint, the sum of seven hundred and eighty-three dollars and ten cents, and that the defendant Susan McCaughey as administratrix of the said Estate of George McCaughey deceased is liable for the whole amount thereof.

That there is also due the Plaintiff from said Defendant as aforesaid, Eighty-Eight Dollars and eighty-one cents, costs, percentage and necessary disbursements, including attorneys' fees allowed by the Court and provided for in said mortgage.

Fourth. That the said sum of seven hundred eighty three 10-100 Dollars and Eighty Eight 81-100 Dollars, making in all $871, 91-100 as aforesaid, is a valid lien upon the lands and premises in the Plaintiff's Complaint, and hereinafter set forth and described, and is secured by the Mortgage mentioned in said complaint;

Fifth. That each and all of the terms and conditions of said Mortgage have been broken by said Defendant Susan McCaughey as administratrix of the Estate of George McCaughey deceased and that Plaintiff is entitled to have said Mortgage enforced and fore-

closed, and the lands and premises hereinafter set forth and described sold in the manner prescribed by law, and the pro-
13 ceeds arising from such sale applied to and upon the payment of said sum of money so due as aforesaid;

Sixth. That each and all of the allegations and averments in Plaintiff's Complaint contained are true and correct;

Now, therefore, on motion of A. E. Putnam, Esq., Counsel for Plaintiff H. J. Finger,

It is Adjudged and Decreed, that all and singular the mortgaged premises mentioned in the said complaint, and hereinafter described, or so much thereof as may be sufficicent to raise the amount due to the Plaintiff for the principal and interest, and costs of this suit, and expenses of sale, and which may be sold separately, without material injury to the parties interested, be sold at auction by the Sheriff of the County of Santa Barbara, in the manner prescribed by law, and according to the course and practice of this Court, and that the said Sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchsers of the mortgaged premises on the said sale.

That the said Sheriff, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay to the Plaintiff out of said proceeds, the sum of Eighty-eight Dollars and eighty-one cents, costs & attorney's fees of this suit. Also
14 pay to the Plaintiff the further sum of seven hundred and eighty-three Dollars and ten cents, the amounts so found due as aforesaid, together with interest thereon at the rate of seven per cent per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

That the Defendant and all persons claiming, or to claim, from or under her, and all persons having liens subsequent to said mortgage by judgment or decree upon the land described in said mortgage, and their personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the Recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of said Sheriff's Deed.

And it is Further Adjudged and Decreed, that the purchaser or purchasers of such mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into
15 possession under them or either of them, deliver possession thereof to such purchser or purchasers, on production of the Sheriff's Deeds for such premises or any part thereof.

The lands and premises directed to be sold by this decree are situated, lying and being in the City and County of Santa Barbara, State of California, and bounded and particularly described as follows, to wit: Part of City Block No. 250 as per the official map of the City of Santa Barbara, viz.: Beginning at a point on the North-

west line of Gutierrez Street, sixty feet Northeasterly from the South corner of said block No. 250, thence along Gutierrez Street Northeasterly 257 feet to a stake, thence at right angles Northwesterly along the Southwest boundary line of lands formerly owed by (and occupied by) Charles Brown, 254½ feet to a stake, thence at right angles Southwesterly along boundary line of land owned and occupied by R. Forbush, 155 feet to a stake; thence Southeastwardly along the boundary line of lands formerly owned by Pablo Vasquez 167½ feet to the Northerly corner of lands granted to George McCaughey by Lyman Alexander on June 15, 1875, by deed recorded in the Recorder's Office of Santa Barbara County in Book P of Deeds at page 3; thence at right angles south-
16 westerly 126 feet to the Northeasterly line of Chapala Street; thence along Chapala Street 45 feet; thence at right angles into said Block 60 feet; thence at right angles 45 feet to the place of beginning. Save and excepting from the above described lands and premises a certain strip or parcel of land described as follows to wit: Beginning at a point on the Northwesterly side of Gutierrez Street, two hundred and eighty-seven feet from the South corner of said Block; thence running northeasterly along said line of Gutierrez Street thirty feet to lands formerly owned by Charles Brown, thence at right angles Northwesterly along line of lands formerly owned by said Brown two hundred and fifty-four feet and six inches, to a stake; thence at right angles Southwesterly along line of lands of R. Forbush thirty feet; thence at right angles Southeasterly to Gutierrez Street and place of beginning: The lands last above described having been released by a partial release of Mortgage, recorded October 17th, 1893, in Book E. of Releases on page 285.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

W. B. COPE,
Judge of the Superior Court.

Done in open Court the 11th day of March, 1895.
17 Filed March 11, 1895.

F. C. BRADLEY, *Clerk.*

(7) Afterwards, to wit, on the 10th day of April, 1895, the said sheriff offered the mortgaged premises aforesaid for sale at public auction, and the defendant, Alexander Lyall, became the purchaser thereof for the sum of $912.20; which sum was the highest and best bid therefor. And said sheriff thereupon issued to said Lyall his certificate of sale of said premises. And, afterwards, to wit, on the 15th day of October, 1895, there being no redemption from said sale, the said sheriff executed and delivered to said Lyall his deed for said mortgaged premises: which deed was duly acknowledged by said sheriff and was recorded in the Recorder's office of Santa Barbara County. And thereafter, to wit, on the 27th day of December, 1897, under a writ of assistance issued in the

said case, the said Lyall was placed in possession of said premises, and has ever since been and still is in possession thereof adversely to these plaintiffs, withholding the possession from them.

The amount so bid by the said Lyall ($912.20) was three (3) cents in excess of the amount due on said judgment at the date of the sale, the said judgment at the time amounting with interest, costs and accruing costs, to the sum of $912.17; and thus
18 the said sale was for the sum of $40.20 in excess of the judgment as subsequently modified as stated in paragraph 8 hereof.

The said land at the date of said sale was and ever since has been, worth not less than the sum of $6000.00.

(8) On the 22nd day of November, 1895, an appeal was taken by the said defendant, the said Susan McCaughey, as administratrix as aforesaid from said Judgment of foreclosure, to the Supreme Court of the State of California, and upon said appeal by judgment of said Court duly made and entered on the 18th day of August, 1896, the said Judgment was modified by deducting from the principal and interest adjudged to be due ($783.10) the sum of $40.20, and as thus modified, was affirmed; but there has been no sale of the said real property under said modified judgment to satisfy the same or any part thereof since the same was made and entered.

(9) The plaintiffs were not made parties to the said foreclosure suit, and were not privy thereto, nor are their rights affected thereby, but they still remain the owners in fee simple of an undivided one-half (½) of said premises and entitled to the possession thereof. But the said defendant Lyall claims to own the whole of said premises, under and by virtue of said foreclosure judgment and sale, and withholds the same from the plaintiffs.

(10) The defendants Mae Morton, J. S. Morton, Emma
19 J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce, claim and each of them claims some interest in or claim to said premises or some part thereof, but such pretended interests or claims are, and each of them is, without foundation or right and wholly void, as against these plaintiffs.

(11) The plaintiffs, on the — day of ——, 189—, and prior to the commencement of this action, demanded of said defendant Lyall, to be let into possession of said premises, but the said defendant refused to comply with said demand.

(12) The plaintiffs are ready and willing to pay to the said defendant Lyall or his successors in interest or the said defendant Finger, as may be adjudged by the Court, the amount due upon said mortgage, with interest and such other amounts as may be deemed right and just by the Court to be paid for costs of suit or otherwise, and that may be found due after accounting for the rents and profits, and they here offer to pay the same, or whatever amount may be found by the Court to be just and due.

Wherefore, plaintiffs pray that it be adjudged that they are the owners of an undivided one-half (½) of the premises aforesaid, and are entitled to the possession thereof; And that the claims of the

said defendants thereto be adjudged to be null and void; and
20 that it be further adjudged that plaintiffs have and recover from said defendants the possession of said premises; and that said defendants account to the plaintiffs for the rents and profits received by them; And that plaintiffs also recoper their costs, and have such further and general relief as their case may require.

McNUTT AND HANNON AND
WM. G. GRIFFITH,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
County of Santa Barbara, ss:

Ann Elizabeth McCaughey, being first duly sworn, deposes and says, That she is one of the plaintiffs above named; that she has read the foregoing Amended Complaint, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters, that she believes it to be true.

ANN ELIZABETH McCAUGHEY.

Subscribed and sworn to, before me, this 16th day of December, A. D. 1905.

[SEAL.]

WM. G. GRIFFITH,
Notary Public in and for the County of Santa Barbara, State of California.

Filed Dec. 18th, 1905.

C. A. HUNT, *Clerk,*
By A. T. EAVES,
Deputy Clerk.

21 *Demurrer of Alexander Lyall to Plaintiffs' Amended Complaint.*

[Title of Court and Cause.]

Now comes the defendant Alexander Lyall a defendant in the above entitled action, and demurres to the amended complaint filed therein on the following grounds, to wit:

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2nd. That the defendant H. J. Finger is improperly joined in said action with the other defendants.

3d. That the defendant Alexander Lyall is improperly joined as a defendant in said action.

Wherefore, the said defendant Alexander Lyall prays that said action may be dismissed with costs.

B. F. THOMAS,
Attorney for Defendant Alexander Lyall.

(Service of the within demurrer made this 29th day of December, 1905.)

WM. G. GRIFFITH,
Attorney for Plaintiff.

Filed Dec. 29th, 1905.

C. A. HUNT, *Clerk.*

Order Sustaining Demurrer of Alexander Lyall.

Minutes of Superior Court.

Book S, Page 13.

[Title of Court and Cause.]

22 Present Wm. G. Griffith, Esq., Counsel for the plaintiffs, and B. F. Thomas, Esq., Counsel for the defendant Alexander Lyall.

The demurrer to the Amended Complaint coming on regularly to be heard the same was argued by counsel for the respective parties and submitted to the Court for consideration and decision, the Court having duly considered the same, and being fully advised in the premises, now renders its decision thereon from the Bench and orders that said Demurrer be and the same is hereby sustained as to the first ground of demurrer, viz: that the Complaint did not state facts sufficient to constitute a cause of action. As to the other grounds of demurrer the same is overruled. The plaintiffs are given ten days to amend.

A true copy.

Attest:

[SUPERIOR COURT SEAL.] C. A. HUNT, *Clerk.*

Filed Jan. 15th, 1906.

C. A. HUNT, *Clerk.*

Demurrer of H. J. Finger.

[Title of Court and Cause.]

Now comes the above named Defendant, H. J. Finger, appearing herein in propria persona, and demurs to the amended complaint of the plaintiffs in the above entitled action upon the following grounds, to wit:—

That said complaint does not state facts sufficient to constitute a cause of action.

23 Wherefore, said defendant prays that he be hence dismissed with his costs.

Dated the 25th day of January, A. D. 1906.

H. J. FINGER,
In Propria Persona.

(Due service of the within demurrer admitted this 25th day of January, 1906.)

McNUTT AND HANNON &
WM. G. GRIFFITH,
Att'ys for Plaintiff.

Filed Jan. 25, 1906.

C. A. HUNT, *Clerk,*
By A. T. EAVES, *Deputy.*

Demurrer of Mae Morton and J. S. Morton.

[Title of Court and Cause.]

Now come the defendants Mae Morton and J. S. Morton and demur to the plaintiffs' complaint herein on the grounds that said complaint does not state facts sufficient to constitute a cause of action.

W. P. BUTCHER,
Attorney for said Defendants.

(Due service of the within demurrer this 26th day of January, 1906, is hereby admitted.)

WM. G. GRIFFITH,
Attorney for Plaintiff.

Filed Jan. 26th, 1906.

C. A. HUNT, *Clerk.*
By H. H. HARRIS,
Deputy Clerk.

Demurrer of F. F. Pierce and A. M. Pierce

[Title of Court and Cause.]

Now come F. F. Pierce and A. M. Pierce, defendants in the above entitled action, and demur to the amended complaint filed therein on the ground that said amended complaint does not state facts sufficient to constitute a cause of action.

24 Wherefore, said defendants pray for judgment that said action be dismissed, and for their costs of suit.

B. F. THOMAS,
Attorney for said Defendants.

(Service of the within demurrer made this 27 day of —— 1906.)

McNUTT AND HANNON,
WM. G. GRIFFITH,
Attorneys for Plaintiffs.

Filed Jan. 27th, 1906.

C. A. HUNT, *Clerk,*
By H. H. HARRIS, *Deputy.*

Demurrer of Mervin C. Faulding and Emma J. Faulding.

[Title of Court and Cause.]

Now come Mervin C. Faulding and Emma J. Faulding, defendants in the above entitled action, and demur to the amended complaint filed therein, on the ground that the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendants pray for judgment that the said action be dismissed and for their costs therein.

B. F. THOMAS,
Attorney for said Defendants.

(Service of the within demurrer made this 27 day of ——, 1906.)
McNUTT AND HANNON &
WM. G. GRIFFITH,
Attorneys for Plaintiff.

Filed Jan. 27th, 1906.
C. A. HUNT, *Clerk,*
By H. H. HARRIS, *Deputy.*

25 *Order Sustaining Demurrers of Finger, Morton, Faulding and Pierce.*

Minutes of Superior Court.

Book S, Page 29.

The Demurrers of H. J. Finger, Mae Morton J. S. Morton, Mervin C. Faulding, Emma J. Faulding, F. F. Pierce and A. M. Pierce to the amended complaint having heretofore been argued and submitted to the Court for consideration and decision, and the Court having duly considered the same, and being fully advised in the premises, now renders its decision thereon from the Bench and orders that the said Demurrers be and the same are hereby sustained and plaintiffs given ten days to amend.

A true copy.
Attest:
[SUPERIOR COURT SEAL.]
C. A. HUNT, *Clerk.*

Filed Jan. 29th, 1906.
C. A. HUNT, *Clerk.*

Judgment.

[Title of Court and Cause.]

The demurrer of the defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce to the

amended complaint in the above-entitled action on the ground that said complaint does not state facts sufficient to constitute a
26 cause of action as against said defendants, having been sustained by this Court with leave to amend within ten days if plaintiffs were advised, and said plaintiffs having been regularly served with notice of the decision of this Court sustaining said demurrers as aforesaid, and more than ten days having elapsed since the service of said notice of decision, and the plaintiffs electing to stand on said amended complaint and declining to amend the same.

Now, therefore, in consideration of the premises and the law in such cases made and provided, on motion of B. F. Thomas, attorney for said defendants.

It is ordered and adjudged that this action as to said defendants be and the same is hereby dismissed; and that said defendants recover their costs herein.

Done in open Court this 17th day of February, 1906.

J. W. TAGGART,
Judge of said Superior Court.

Filed Feb. 17th, 1906.

C. A. HUNT, *Clerk*,
By H. H. HARRIS, *Deputy*.

[Title of Court and Cause.]

I, the undersigned, County Clerk of the County of Santa Barbara, State of California, and Clerk of the Superior Court thereof, do hereby certify the foregoing to be a true copy of the Judg-
27 ment entered in the above-entitled action and recorded in the Judgment Book F, of said Court, at page 73. And I further certify that the foregoing papers, hereunto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of said Court this 19th day of February, A. D. 1906.

[Superior Court Seal.]

C. A. HUNT, *Clerk*.

Filed Feb. 19th, 1906.

C. A. HUNT, *Clerk*.

Notice of Appeal.

[Title of Court and Cause.]

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the Supreme Court of the State of California from the judgment therein entered in the Superior Court of the County of Santa Barbara, State of California, on the 19th day of February, 1906, in favor of the defendants, Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce,

in said action, and against said plaintiffs, and from the whole of said judgment.

Dated at Santa Barbara, Cal., the 15th day of August, A. D. 1906.

McNUTT & HANNON AND
WM. G. GRIFFITH,
Attorneys for Plaintiffs.

28 To the defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce, and to B. F. Thomas, their attorney, and to the defendants Mae Morton and J. S. Morton, and to W. P. Butcher, their attorney, and to the defendant H. J. Finger, and to the Clerk of said Superior Court.

Due service of the within Notice of Appeal this 16th day of August, 1906, is hereby admitted.

B. F. THOMAS,
Attorney for Defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce.

Reserving right to object to said notice if not served in time.

W. P. BUTCHER,
Attorney for Defendants Mae Morton and J. S. Morton.

H. J. FINGER,
In Prop. Pers.

Filed Aug. 16th, 1906.

C. A. HUNT, *Clerk.*
By A. T. EAVES,
Deputy Clerk.

Stipulation as to Contents of Judgment Roll.

[Title of Court and Cause.]

29 It is hereby stipulated that the Judgment Roll on appeal by the plaintiffs from the judgment of the Superior Court of the County of Santa Barbara, State of California, entered in said action on the 19th day of February, 1906, shall consist of the following papers and pleadings as the same appear on file in the office of the Clerk of said Court, in said action, and none other, viz:—

1. Plaintiffs' Amended Complaint.
2. Demurrer of the Defendant Alexander Lyall to Plaintiffs' Amended Complaint.
3. Order sustaining Demurrer of Defendant Lyall.
4. Demurrer of Defendant H. J. Finger to Plaintiffs' Amended Complaint.
5. Demurrer of Defendants Mae Morton and J. S. Morton to Plaintiffs' Amended Complaint.

6. Demurrer of Defendants F. F. Pierce and A. M. Pierce to Plaintiffs' Amended Complaint.

7. Demurrer of Defendants Mervin C. Faulding and Emma J. Faulding to Plaintiffs' Amended Complaint.

8. Order sustaining Demurrers of the Defendants H. J. Finger, Mae Morton, J. S. Morton, Mervin C. Faulding, Emma J. Faulding, F. F. Pierce and A. M. Pierce to the Plaintiffs' Amended Complaint.

9. Judgment of Dismissal as to the Defendants Alexander
30 Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce.

10. Certificate of the Clerk to the Judgment Roll.

It is further stipulated that said action was commenced by the filing of an Original Complaint in said Superior Court on the 30th day of October, 1905; and that this stipulation shall constitute a part of the Transcript in such appeal.

Dated at Santa Barbara, Cal., the 31st day of August, A. D. 1906.

McNUTT & HANNON AND
WM. G. GRIFFITH,
Attorneys for Plaintiffs.
B. F. THOMAS,
Attorney for Defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce.
W. P. BUTCHER,
Attorney for Defendants Mae Morton and J. S. Morton.
H. J. FINGER,
In Propria Persona.

Filed Sept. 1st, 1906.

C. A. HUNT, *Clerk.*

Certificate to Transcript of Record.

[Title of Court and Cause.]

I, C. A. Hunt, Clerk of the County of Santa Barbara, State of California, and ex officio Clerk of the Superior Court of said
31 County, do hereby certify that the foregoing transcript of the record in the case of Edward Quigley McCaughey et al., plaintiffs, vs. Alexander Lyall et al., defendants, contains full, true and correct copies of the following papers and pleadings as the same appear on file in the office of the Clerk of said Court in said action, viz.:—

1. Plaintiffs' Amended Complaint.

2. Demurrer of the Defendant Alexander Lyall to Plaintiffs' Complaint.

3. Order sustaining Demurrer of Defendant Lyall.

4. Demurrer of Defendant H. J. Finger to Plaintiffs' Amended Complaint.

5. Demurrer of Defendants Mae Morton and J. S. Morton to Plaintiffs' Amended Complaint.

6. Demurrer of Defendants F. F. Pierce and A. M. Pierce to Plaintiffs' Amended Complaint.

7. Demurrer of Defendants Mervin C. Faulding and Emma J. Faulding to Plaintiffs' Amended Complaint.

8. Order sustaining Demurrers of the Defendants H. J. Finger, Mae Morton, J. S. Morton, Mervin C. Faulding, Emma J. Faulding, F. F. Pierce and A. M. Pierce to the Plaintiffs' Amended Complaint.

Judgment of Dismissal as to the Defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce.

32 And Also of the Notice of Appeal.

And I further certify that an undertaking on appeal in due form has been properly filed in said case.

In Witness whereof I have hereunto set my hand and the seal of said Superior Court, the 19th day of September, A. D. 1906.

[SEAL.] C. A. HUNT, *Clerk.*

33 I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original transcript now on file in this office in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

34 Department Two. January 14, 1908.

L. A. No. 1967.

EDWARD QUIGLEY MCCAUGHEY et als., Plaintiffs and Appellants,
v.
ALEXANDER LYALL et als., Defendants and Respondents.

Probate Law—Foreclosure of Mortgage—Parties—Administrator Only Necessary Party.—In an action to foreclose a mortgage executed by a deceased person, the only necessary party defendant is the administratrix of his estate, and the heirs at law of the mortgagor are not required to be made parties to the suit in order to divest them of the title to the mortgaged property which the law cast upon them upon the death of their intestate ancestor.

Id.—Id.—Id.—Id.—A Matter of Legislative Control.—The matter of providing whom should be made parties defendant in actions to enforce claims or liens against the estates of deceased persons is exclusively within the province of the legislature, and no constitutional questions can arise relative thereto.

Appeal from the Superior Court of Santa Barbara County—J. W. Taggart, Judge.

For Appellants—McNutt & Hannon and Wm. G. Griffith.
For Respondents—B. F. Thomas, W. P. Butcher and H. F. Finger in propria persona.

George McCaughey died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime,
35 on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for $500 which was due and unpaid at the death of the decedent. After his death Susan McCaughey was duly appointed and qualified as administratrix of his estate. The note and mortgage were duly presented to the administratrix and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have it adjudicated that they are the owners of an undivided one-half of the said land; that the claim of the defendants thereto be adjudged null and void; that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained; and plaintiffs declining to amend judgment was rendered for defendants. From this judgment plaintiffs appeal.

The point relied on by appellants for reversal is that the judgment in the foreclosure suit was null and void as against them because they were not made parties to that suit, and were not given notice of its pendency. Counsel for appellants say in their brief: "This cause is brought here for the purpose of having reviewed a single question arising from the record. This question is best suggested by the inquiry—can the heir at law be divested of the title which the law casts upon him at the death of his intestate ancestor by any proceeding to which he is not made a party? This court has more than once decided the question in the affirmative. We believe the decisions are wrong in the particulars to which we shall presently advert, and we therefore shall respectfully urge that they be overruled and the right rule of the law established." This statement and admission make it unnecessary for us to reveiew the former decisions of this court to show that they do establish the law in the manner as admitted by appellants. Some of the cases are these: Cunningham v. Ashley, 45 Cal. 485; Bayly v. Muehe, 65 Cal. 345; Finger v. McCaughey, 119 Cal. 57; Dickey v. Gibson, 121 Cal. 276. In these cases it is held that — an action to enforce claims and liens against an estate where the same might have been maintained against the deceased if living, the only necessary party defendant is the ad-

ministrator; and as those decisions have established a rule of property under which no doubt many titles are held, we have no disposition at this time to review the question again and consider the correctness of those decisions. It is clearly a matter in which the rule of stare decisis should apply.

Appellants contend that the former decisions should not be taken as final because if the construction which they give to certain sections of the code, and particularly section 1582 of the Code of Civil Procedure, are correct, then those sections are unconstitutional as violative of section 13 of the constitution of this state which declares that no one can be deprived of property "without due process of law," which they say includes "notice" to the person who is to
36 be deprived of property. The fourteenth amendment of the federal constitution is also invoked. As our state constitution does not deal in any way with heirships and descents and distributions of estates, it is somewhat difficult to imagine how, on that subject, any constitutional question can be discovered or invented; at all events we see none here. The legislature had full control of the whole subject, and the rights of an heir are merely those which he takes under legislative provision; the right to be an heir at all comes from the legislature. Now the code which provides that upon the death of the ancestor the title to his land vests immediately in the heirs, has many other provisions which limit and qualify that title and subject it to many conditions deemed proper for the settlement of estates. There is no doubt that the legislature has the power to provide that in suits for the enforcement of claims and liens against the estate only the administrator need be made a party defendant; and that is exactly what the legislature did by section 1882 of the Code of Civil Procedure, as decided by the former decisions. Counsel contends that this construction of the section is wrong—but no constitutional question arises. The legislature has also, beyond doubt, the power to declare that in proceedings against an estate, like those above mentioned, the heir should be represented by the administrator, and therefore not entitled to notice; and the former decisions declare that such, under the law, is the rule. Counsel claim that this decision is also wrong; but still no constitutional question arises. The heir takes subject to the conditions imposed by the statutory law which alone gives him any right at all.

The judgment appealed from is affirmed.

McFARLAND, *J.*

We concur:
LORIGAN, *J.*
HENSHAW, *J.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original opinion, now on file in this office in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

37 In the Supreme Court of the State of California. In Bank.

L. A. No. 1967.

McCAUGHEY
vs.
LYALL.

By the COURT: Rehearing denied, February 10, 1908.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original rehearing denied, February 10, 1908, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

38 (Copy.)

Clerk's Register of Actions.

Santa Barbara County.

Los Angeles No. 1967.

EDWARD Q. McCAUGHEY et al., Plaintiffs,
v.
ALEXANDER LYALL et al., Defendants.

McNutt & Hannen, W. G. Griffith.
B. F. Thomas, W. P. Butcher.

1906.
Sept. 21. Filed Transcript L. A..... $10.00
Nov. 5. " Stip. Aplnt. 30 days addn*t.* to file open brief (order Nov. 6, 1906).
1907.
Jan. 30. " Appellants' open brief.
March 8. " Respondents' "
April 1. " Appellants' Reply "
Oct. 25. Cause ordered submitted on briefs on file.
1908.
Jan'y 14. Judgment Affirmed.
" 25. Filed petition for rehearing L. A..... 2.50
Feb'y 10. By the Court Rehearing denied.
" 14. Remittitur to County Clerk.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of entries in Clerk's Register of Actions in L. A. No. 1967—McCaughey et al., versus Lyall et al., as shown by the records of my office.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

39 In the Supreme Court of the State of California.

L. A. No. 1967.

EDWARD QUIGLEY MCCAUGHEY et al.
vs.
ALEXANDER LYALL et al.

On Appeal from the Superior Court of the County of Santa Barbara.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed are true and correct copies of Petition for Writ of Error, Assignments of Error, Allowance for Writ of Error, Original Writ of Error, Original Citation, Bond, Transcript, Opinion, Petition for Rehearing, Order denying Rehearing, and Entries in Clerk's Register of Actions, in above entitled cause.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

40 In the Supreme Court of the State of California.

Los Angeles, No. 1967.

EDWARD QUIGLEY MCCAUGHEY et al., Plaintiffs and Appellants,
versus
ALEXANDER LYALL et al., Defendants and Respondents.

Appellants' Petition for a Hearing in Bank.

Appeal from Superior Court in the County of Santa Barbara, Hon. J. W. Taggart, Judge.

McNutt & Hannon and Wm. G. Griffith, Attorneys for Appellants, Santa Barbara, Cal.

Filed January 25, 1908.
F. L. CAUGHEY, *Clerk*,
By R. L. DUNLAP, *Deputy Clerk*.

41 In the Supreme Court of the State of California.

L. A., No. 1967.

EDWARD QUIGLEY MCCAUGHEY et al., Plaintiffs and Appellants,
vs.
ALEXANDER LYALL et al., Defendants and Respondents.

Appellants' Petition for a Hearing in Bank.

To the Hons. the Chief Justice and the Associate Justices of said Court:

We present this petition for a rehearing in this cause, because we feel constrained to ask the attention of the Court to what seems to us at once novel and startling in the decision and opinion
42 pronounced in department. In doing so, we do not expect to add anything to what we have said in our Briefs filed before the submission of the case, for we stated, as clearly and briefly as we know how to state, the propositions on which we rely.

We recognize the fact that this Court had decided in former cases, that it was sufficient in a proceeding to foreclose a mortgage executed by an intestate, after the death of such intestate, to make his administrator the sole party defendant. But, as we have shown in our reply Brief, those decisions were made only upon the statutes, and dealt with the question of the construction of such statutes. No constitutional question was suggested by the parties in those cases, or considered by the Court in its decision of them. In this appeal the constitutional question has been fairly and squarely raised, and we have asked the Court to consider that question, insist-

ing that a judgment of foreclosure against the administrator alone, and the sale of the property under such foreclosure, if held valid, would necessarily have the effect to deprive the heirs at law, in this case the children of the decedent, of their property without due process of law.

This contention is met by the statement, that no constitutional question is raised upon the record. We do not know whether we quite rightly apprehend the position of the author of the opinion.

If we do, however, the ground for the statement, that no
43 constitutional question arises here, seems to be that, inasmuch as the legislature has the power, and has exercised that power, of declaring who shall be the heirs of an intestate, and the measure of the estate which such heirs shall take, also has the power to declare that the title cast upon such heirs at the death of the intestate may be divested without due process of law. If there be any or further ground for the statement in the opinion, it must be found in the following:

"As our State Constitution does not deal in any way with heirships and descents and distributions of estates, it is somewhat difficult to imagine how, on that subject, any constitutional question can be discovered or invented; at all events we see none here. The legislature had full control of the whole subject, and the rights of an heir are merely those which he takes under legislative provision; the right to be an heir at all comes from the legislature."

And then the opinion proceeds to state that the Code provides, that upon the death of the ancestor, the title to his land vests immediately in the heir. But, it is argued, the Code has many other provisions which limit and qualify that title and subject it to many conditions deemed proper for the settlement of estates.

We confess our inability to follow to the conclusions reached by the author of these premises. Nothing is better established
44 as a doctrine of the law than that the title of real property is always lodged in some person. As said in the opinion, the legislature of California has, by express provision, provided that upon the death of an intestate ancestor, such title shall vest immediately in the next of kin—in his children, if he have any. As shown in our Briefs heretofore filed in this cause, this takes place immediately upon the death of the ancestor, subject only to administration. If the estate be so vested, we cannot understand why or upon what principle it can be divested any more than any other vested estate in any other class of persons, without due process of law. And we think that an examination of the authorities and of the suggestions in the Briefs of appellants herein will satisfy this Court that whatever ruling should be made in respect of the judgment of the Court below, the grounds for it must be other and different than those upon which the opinion complained of proceeds.

It is further ruled in the decision complained of, that this is a case or a question to which the rule of stare decisis should apply.

We believe that we have answered this position in our reply Brief, but we beg leave to recur to the point again. It will be

observed that in none of the former cases decided, and of which we have complained, and which construe the statutes, was the constitutional question raised by the parties or considered by the
45 Court. True, in Bayly vs. Muehe, 65 Cal., 345, counsel for respondent barely suggested the point, but Mr. Justice Ross, who delivered the prevailing opinion, takes no notice of any constitutional question. In his dissenting opinion, Justice Thornton mentions the point, but says no more than this:

"It does seem to me that to hold that the heirs are not necessary parties in such a case as the one under discussion, is to divest a person of his title without his being heard or having his day in cocurt, and to deny him due process of law—a proceeding violative both of the state and federal Constitutions."—(P. 350.)

As is said in 26 Am. & Eng. Encyc. of Law, p. 162, Courts seldom undertake to pass upon the validity of legislation where the question is not raised by the parties. The fact that a statute has been construed, its meaning defined, and its provisions enforced in other decisions, does not conclude the Court upon its constitutionality merely because that point might have been raised and determined in the first instance.

Boyd vs. Alabama, 94 U. S. 645.

The constitutionality of § 1582 C. C. P. not having previously been passed upon nor the question raised, the decisions construing that section can hardly be relied upon to support either such constitutionality or the application of the rule of stare decisis.
46 We respectfully ask that a rehearing shall be granted, for the foregoing reasons and upon the foregoing grounds, and for such further action of the Court in the premises as may seem right.

Dated the 23rd day of January, 1908.

McNUTT & HANNON AND
WM. G. GRIFFITH,
Attorneys for Appellants.

47 I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original petition for a hearing in Bank, now on file in this office, in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

48 In the Supreme Court of the State of California.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs and Appellants,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants and Respondents.

Petition for Writ of Error.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Your petitioners, Edward Quigley McCaughey and George Joseph McCaughey, minors, by their guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, the plaintiffs and appellants in the above entitled cause, respectfully show:

That said action was commenced and the complaint of said plaintiffs filed in the Superior Court of the County of Santa Barbara, State of California, on the 30th day of October, 1905; that in said complaint and in the amended complaint of said plaintiffs thereafter filed in said action it is alleged that said plaintiffs are the children and sole heirs at law of one George McCaughey who died intestate in said County of Santa Barbara on the 1st day of March, 1890, leaving certain real property situated in said County of Santa Barbara, in said complaint described, which was community property, subject to a mortgage executed by said intestate in his life time to the defendant H. J. Finger; that after the death of said George McCaughey, his widow, Susan McCaughey, the mother of your petitioners and the guardian of said Edward Quigley Mc-

49 Caughey and George Joseph McCaughey, was appointed administratrix of his estate and duly qualified as such, and letters of administration were issued to her by said Superior Court of the County of Santa Barbara; that thereafter said defendant, H. J. Finger, brought his action to foreclose said mortgage against the said Susan McCaughey as such administratrix, without making any of your petitioners party defendants to said action; that said Susan McCaughey as such administratrix defaulted in said action and judgment of foreclosure was given against her, and said premises were thereafter sold under order of sale issued on said judgment for the sum of $912.20, and that the same were worth not less than the sum of $6000.00; and said plaintiffs prayed for judgment quieting their title to the undivided one-half of said property which had descended to them upon the death of their said ancestor; all of which will more fully appear from the amended complaint of said plaintiffs, your petitioners herein, on file in said action;

That thereafter demurrers of the defendants and respondents

herein to said amended complaint were sustained by said Superior Court on the ground that said amended complaint did not state facts sufficient to constitute a cause of action, and said plaintiffs refusing to further amend*ed* their complaint, judgment of said Superior Court was given and made in favor of said defendants; that thereafter, upon appeal duly taken by said defendants to this Court from said judgment, judgment was entered in this Court on the 14th day of January, 1908, in favor of said defendants and against said plaintiffs, affirming said judgment of said Superior Court; that thereafter a petition for rehearing was filed by said plaintiffs and appellants and was presented and considered by this Court and was on the 10th day of February, 1908, denied by this Court, whereupon said judgment of this Court became final;

50 That said Edward Quigley McCaughey, George Joseph McCaughey, Ann Elizabeth McCaughey and John Peter McCaughey, the said appellants, are aggrieved in that in said judgment of this Court and the proceedings had prior thereto in this case, certain errors were committed to their prejudice, and in that there was drawn in question the validity of a statute of the State of California, to wit: Section 1582 of the Code of Civil Procedure of the State of California, as construed by the decisions of this Court, on the ground of its being repugnant to Section 1 of Article 14 of the Constitution of the United States, and resulted in depriving these appellants of their property without due process of law, all of which will more fully appear in detail from the assignment of errors filed herewith; that said case was presented both to the Superior Court of said County of Santa Barbara and to this Court solely on the federal question of the repugnancy of said statute as so construed to the constitution of the United States.

That your petitioners desire to present said matter to the Supreme Court of the United States for review, and therefore pray that a writ of error may issue to the Supreme Court of the State of California for the correcting of errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States.

Respectfully,

(Signed) McNUTT, McNUTT & HANNON,
WM. G. GRIFFITH,
Attorneys for Edward Quigley McCaughey and George Joseph McCaughey, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey.

Writ allowed Feb'y 9th, 1910.

W. H. BEATTY,
Chief Justice of the State of California.

Filed Jan. 20, 1910.

F. J. CAUGHEY, *Clerk,*
By DUNLAP, *Deputy.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original Petition for Writ of Error, now on file in this office, in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk*,
By I. ERB, *Deputy Clerk*.

51 [Endorsed:] Copy. Supreme Court of the State of California. Edward Quigley McCaughey et al., Appellants, vs. Alexander Lyall et al., Respondents. Petition for Writ of Error.

52 In the Supreme Court of the United States.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs in Error,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants in Error.

Assignment of Error on Writ of Error to State Court.

Now come the plaintiffs in the above entitled cause and aver and show that in the record and proceedings in said cause, the supreme court of the state of California erred to the grievous injury and wrong of the plaintiffs herein, and to the prejudice, and against the rights of the plaintiffs in error, in the following particulars, to-wit:

(1) The said supreme court erred in holding that Section 1582 of the Code of Civil Procedure of the State of California, as construed by the decisions of the said Supreme Court of California, is not repugnant of Section 1, of Article 14 of the Constitution of the United States.

(2) The said Supreme Court erred in holding that the decree of foreclosure entered in the action brought in the Superior Court of California, for the County of Santa Barbara, wherein H. J. Finger was plaintiff, and Susan McCaughey, as administratrix of the estate of George McCaughey, deceased, was defendant, and the sale had under such decree did not result in depriving the plaintiffs in error of their property without due process of law.

53 (3) The said Supreme Court erred in not reversing the decree of the trial court and in not giving to plaintiffs in error their rights under Section 1 of Article 14 of the Constitution of the United States, as the owners of the undivided one-half (½) of the property described in the complaint.

(4) The said Supreme Court erred in sustaining the decree of the Superior Court of California, for the County of Santa Barbara, entered in said cause upon sustaining the demurrers of defendants to the complaint therein, adjudging and decreeing that the plaintiffs take nothing by their action.

(5) The said Supreme Court erred in not reversing the order and decree of the Superior Court of California in and for the County of Santa Barbara, sustaining the demurrers of the several defendants to the complaint herein.

(6) The said Supreme Court erred in not reversing the judgment and decree of the trial court holding that the complaint of the plaintiffs in error, does not state a cause of action.

Wherefore, for these and other manifest errors appearing in the record the said Edward Quigley McCaughey and George Joseph McCaughey, minors, by their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, plaintiffs in error, pray that the judgment of the said Supreme Court of California be reversed and set aside and held for naught, and that judgment be rendered for plaintiffs in error; and plaintiffs in error also pray judgment for their costs.

McNUTT, McNUTT & HANNON,
WM. G. GRIFFITH,
Attorneys for Edward Quigley McCaughey and George Joseph McCaughey, Minor, by Their Guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original assignment of error, now on file in this office, in the above-entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

54 [Endorsed:] Copy. L. A. 1967. Supreme Court of the State of California. Edward Quigley McCaughey et al., Appellants, vs. Alexander Lyall et al., Respondents. Assignments of Error.

55 I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original allowance of Writ of Error, now on file in this office, in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk*,
By I. ERB, *Deputy Clerk*.

55½ In the Supreme Court of the State of California.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs and Appellants,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Em-a J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants and Respondents.

Allowance of Writ of Error.

Comes now Edward Quigley McCaughey and George Joseph McCaughey, minors, by their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, the appellants above named, on this 20th day of January A. D. 1910, and file and present to this Court their petition, praying for the allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioners an opportunity to test in the Supreme Court of the United States, the question therein presented, it is ordered by this court that a writ of error be allowed as prayed, provided, however, that said appellants give bond according to law in the sum of Five Hundred dollars.

In testimony whereof, I have set my hand this 9th day of February, A. D. 1910.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Filed Feb. 9, 1910.
F. J. CAUGHEY, *Clerk*,
By ERB, *Deputy*.

56 [Endorsed:] Copy. L. A. 1967. Supreme Court of the State of California. Edward Quigley McCaughey et al., Appellants, vs. Alexander Lyall et al., Respondents. Allowance of Writ of Error.

57 In the Supreme Court of the United States.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, by Their Guardian Susan McCaughey, and Ann Elizabeth McCaughey, and John Peter McCaughey, Plaintiffs in Error,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which became final February 10, 1908, of a plea which is in the said Supreme Court of the State of California, before you, at a regular term thereof, being the highest court of law or equity of said State, in which a decision could be had in said suit between Edward Quigley McCaughey and George Joseph McCaughey, minors, by their guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, plaintiffs and appellants therein, and Alexander Lyall, H. J. Finger, Mae Morton, J. S. Morton, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce, defendants and respondents therein, No. L. A. 1967, wherein was drawn in question the validity of a treaty
58 or statute of, or an authority exercised under, said State of California, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Edward Quigley McCaughey and George Joseph McCaughey, minors, by their guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of February in the year of our Lord one thousand nine hundred and ten.

59 Done in the city of San Francisco, State of California, with the seal of the circuit court of the United States for the northern district of California attached.

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States,
Northern District of California.

Allowed by

W. H. BEATTY,
Chief Justice of the Supreme Court,
of the State of California.

Feb'y 10, 1910.

60 [Endorsed:] L. A. 1967. Original. In the Supreme Court of the United States. Edward Quigley McCaughey, et al., Plaintiffs, vs. Alexander Lyall, et al., Defendants. Writ of Error. Messrs. McNutt & Hannon and Wm. G. Griffith, Attorneys for Plaintiffs. Filed Feb. 10, 1910. F. L. Caughey, Clerk, by Erb, Deputy.

61 In the Supreme Court of the United States.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, by Their Guardian Susan McCaughey, and Ann Elizabeth McCaughey, and John Peter McCaughey, Plaintiffs in Error,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alexander Lyall, H. J. Finger, Mae Morton, J. S. Morton, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce, defendants, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of California, wherein Edward Quigley McCaughey and George

Joseph McCaughey, by their guardian Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

62 Witness the chief justice of the Supreme Court of the State of California this 10th day of February A. D. 1910.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

63 Due service of the within citation and receipt of a copy thereof this 14th day of February, 1910, is hereby admitted.

B. F. THOMAS,
Attorney for Defendants Alexander Lyall, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce, and A. M. Pierce.
W. P. BUTCHER,
Attorney for Defendants Mae Morton and J. S. Morton.
H. J. FINGER,
In Propria Persona.

[Endorsed:] Original. L. A. 1967. In the Supreme Court of the United States. Edward Quigley McCaughey et al., Plaintiffs in Error, vs. Alexander Lyall et al., Defendants in Error. Citation. Messrs. McNutt & Hanson and Wm. G. Griffith, Attorneys for Plaintiffs. Filed Feb. 16, 1910. F. L. Caughey, Clerk, by Erb, Deputy.

64 In the Supreme Court of the United States.

EDWARD QUIGLEY MCCAUGHEY and GEORGE JOSEPH MCCAUGHEY, Minors, by Their Guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, Plaintiffs and Appellants,

vs.

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce, Defendants and Respondents.

Bond on Writ of Error.

Know all men by these presents: That we, Edward Quigley McCaughey and George Joseph McCaughey, minors, by their guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, as principals, and the United States Fidelity and Guarantee Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto the above named Alexander Lyall, H. J. Finger, Mae Morton, J. S.

Morton, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce in the sum of Five Hundred Dollars to be paid to them and for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of January, 1910.

The condition of the above obligation is such that whereas the said Edward Quigley McCaughey and George Joseph McCaughey, minors, by their guardian, Susan McCaughey, and Ann Elizabeth McCaughey and John Peter McCaughey, plaintiffs in error,
65 seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of California;

Now, therefore, if the said plaintiffs in error shall prosecute their writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and virtue.

(Signed) SUSAN McCAUGHEY,
Guardian of Edward Quigley McCaughey & George Joseph McCaughey.
ANN ELIZABETH McCAUGHEY.
J. P. McCAUGHEY.

[CORPORATE SEAL.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By H. V. D. JOHN, *Attorney in Fact;*
JESSE M. WHITED, *Attorney in Fact.*

The foregoing bond is approved this 9th day of January, A. D. 1910.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original Bond, now on file in this office, in the above entitled cause as shown by the records of my office.

Witness my hand and the seal of the Court, this 16th day of February, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 17th day of January, in the year of our Lord one thousand nine hundred and 10, before me, personally appeared H. V. D.

Johns & Jesse M. Whited, known to me to be the person- whose names are subscribed to the within instrument as the Attorneys-in-fact for The United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and the- own name- as Attorney-in-Fact.

(Signed) M. J. CLEVELAND,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

[Endorsed:] Copy. L. A. 1967. In the Supreme Court of the United States. Edward Quigley McCaughey et al., Plaintiffs and Appellants, vs. Alexander Lyall et al., Defendants and Respondents. Bond on Writ of Error. Filed Jan'y 25, 1910. F. L. Caughey, Clerk. By I. Erb, Deputy Clerk.

Endorsed on cover: File No. 22,059. California Supreme Court. Term No. 228. Edward Quigley McCaughey and George Joseph McCaughey, Minors, by their Guardian Susan McCaughey et al., Plaintiffs in Error, vs. Alexander Lyall, H. J. Finger, Mae Morton et al. Filed March 10th, 1910. File No. 22,059.

2

No. [redacted] 228

IN THE SUPREME COUR

OF THE

UNITED STATES

EDWARD QUIGLEY McCAUGHEY and GEORGE JOSEPH McCAUGHEY, minors, by their Guardian SUSAN McCAUGHEY, and ANN ELIZABETH McCAUGHEY and JOHN PETER McCAUGHEY,
Plaintiffs in Error,

versus

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, EMMA J. FAULDING, MERVIN C. FAULDING, F. F. PIERCE and A. M. PIERCE,
Defendants in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR

In Error to the Supreme Court of the State of Californi

Cyrus F. McNutt,
McNutt & Hannon and
Wm. G. Griffith,
Attorneys for Plaintiffs in Err

Filed _____ *1910.*

_____ *Clerk.*

By _____ *Deputy Clerk*

H. S. CRILDERS, PRINTER.

IN THE SUPREME COURT

OF THE

United States

EDWARD QUIGLEY McCAUGHEY and GEORGE JOSEPH McCAUGHEY, minors, by their Guardian SUSAN McCAUGHEY, and ANN ELIZABETH McCAUGHEY and JOHN PETER McCAUGHEY, *Plaintiffs in Error,* versus ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, EMMA J. FAULDING, MERVIN C. FAULDING, F. F. PIERCE and A. M. PIERCE, *Defendants in Error.*	OPENING BRIEF OF PLAINTIFFS IN ERROR

In Error to the Supreme Court of the State of California.

INTRODUCTION.

MAY IT PLEASE THE COURT:

This cause is brought here to review a judgment of the Supreme Court of the State of California affirming a judgment of the Superior Court of said State in and for the county of Santa Barbara, rendered upon a general demurrer to the amended complaint of the plaintiffs, upon which a single federal question

was presented to the Superior Court and was afterwards on appeal presented to the Supreme Court of the State of California for review, and which is best suggested by the inquiry, can the heir at law be divested of the title which the law casts upon him at the death of his intestate ancestor by any proceeding to which he is not made a party?

The Supreme Court of the State of California had more than once in construing the statutory law of said State (Section 1582 of the Code of Civil Procedure) decided the question in the affirmative, and so decided in the case at bar (McCaughey vs. Lyall, 152 Cal., 615).

We earnestly endeavored to show to that Court upon presentation of the case on appeal, that the law as so construed was in direct violation of Section 1, Article 14 of the Amendments to the constitution of the United States, as well as in violation of Article 13 of the constitution of the State of California, in that it deprived the heir at law of his property without due process of law, and we respectfully urged that such decisions be overruled and the right rule of law established.

The Supreme Court in its decision, however, upheld the law and decided the case adversely to the plaintiffs in error; and having raised the federal question above mentioned both in the Superior Court and in the State Supreme

Court, we have brought the case to this Court on writ of error, in the earnest expectation that the law in question may be held to be unconstitutional, and the judgment of the State Supreme Court reversed.

STATEMENT OF THE CASE.

The facts in the case, briefly stated, are as follows: George McCaughey, the deceased ancestor of the plaintiffs in error, gave to one Henry J. Finger, on the 6th day of June, 1889, his promissory note secured by a real estate mortgage, by which he mortgaged the tract of land, the undivided one-half of which is sought to be recovered in this action. McCaughey died intestate on March 1st, 1890, leaving surviving him his widow, Susan McCaughey, and the plaintiffs in error, his children, two of whom are still minors and wards of their mother, the said Susan McCaughey. The widow, Susan McCaughey, was appointed administratrix of the estate of George McCaughey, deceased, on the 7th day of April, 1890, and thereafter and on the 31st day of January, 1894, the said Henry J. Finger commenced an action against the said Susan McCaughey, as such administratrix, for the foreclosure of said mortgage. Judgment by default was entered on the 11th day of March, 1895, in favor of the plaintiff for the total

amount of $871.91 and decreeing the foreclosure of the mortgage and ordering the sale of the mortgaged premises to satisfy the judgment. The judgment was subsequently modified on appeal to the Supreme Court of the State of California, by deducting from the amount found to be due by the Superior Court the sum of $40.20 and as so modified was affirmed.

Under the judgment of foreclosure and order of sale, the premises were sold by the sheriff of Santa Barbara County on the 10th day of April, 1895, and were bid in by the defendant in error, Alexander Lyall, for the sum of $912.20, being $40.20 in excess of the judgment as modified with the interest due thereon, although it was actually worth not less than $6000.00. The plaintiffs in error were not made parties defendant to said foreclosure suit, although as heirs at law of the said George McCaughey, deceased, they were the owners of the undivided one-half of said premises, but the sole defendant was Susan McCaughey, the said administratrix. The defendants in error Mae Morton, J. S. Morton, Emma J. Faulding, Mervin C. Faulding, F. F. Pierce and A. M. Pierce claim adverse interests in the real property in question subsequent to the claim of the plaintiffs in error, and are, therefore, made defendants. The

plaintiffs in error have demanded possession of the premises and have always been ready and willing to pay to the defendant in error Lyall, or his successors in interest, the amount that might be due upon said mortgage with interest and costs of suit, after an accounting for rents and profits received by him.

The foregoing facts were all alleged in plaintiffs' amended complaint, and a demurrer on behalf of the defendants in error was sustained by the Superior Court on the ground that the amended complaint did not state facts sufficient to constitute a cause of action. Judgment was entered accordingly in favor of the defendants, and it was from that judgment that an appeal was taken to the Supreme Court of the State of California where the judgment of the Superior Court was affirmed. In both the Superior Court and the State Supreme Court we raised the constitutional question here presented to this honorable Court for review, and it is the decision of the State Supreme Court on that question that we here assign as error, and specify said error more particularly as follows:

SPECIFICATION OF ERROR.

The Supreme Court of the State of California erred in deciding that Section 1582 of the Code of Civil Procedure of the State of Cali-

fornia is not repugnant to Section 1 of Article 14 of the constitution of the United States, and that the heirs at law of a deceased mortgagor of real property are not necessary defendants in a suit to foreclose such mortgage.

ARGUMENT.

Section 1384 of the Civil Code of the State of California provides that, "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration."

The Supreme Court of the State of California has repeatedly held that upon the death of the ancestor, the title to the real estate vests immediately in the heir.

Bates vs. Howard, 105 Cal., 173, at 183;
Estate of Woodworth, 31 Cal., 595, at 604;
Chapman vs. Hollister, 42 Cal., 462, 463.

It is not contended that the legislature has not the power to provide that such heir shall take the estate subject to burden, such as the payment of the debts of the ancestor and support of his family for the time being, that is, during administration.

Brenham vs. Story, 39 Cal., 179-185.

That follows from the principles of the law, that the right of the heir to inherit at all depends upon the positive law of the state.

But when the law of the state has established the right of the heir to take by descent and has provided that such descent shall be cast *eo instanti* at the death of the ancestor, his right is fixed by such positive law and he becomes invested of the measure of title which that law has fixed and he cannot be divested of such title without due process of law.

As already said, the heir takes subject to the possession of the administrator for the purposes of administration and with that limitation excepted he holds precisely the title held by the ancestor. It should seem, therefore, that his title is the same as that of the ancestor, unless there be some act done by the administrator or by the court in the course of administration, which shall in its terms and nature operate to lessen or qualify the title with which the heir becomes vested upon the death of the ancestor.

Section 1582 of the Code of Civil Procedure reads as follows: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and

all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

It is this statute that is the basis of the rule established by the Supreme Court of the State of California that the heir at law is not a necessary party defendant in an action for the foreclosure of a mortgage given by his ancestor during his life time, and it is of this statute that we complain, and we respectfully urge that said statute is repugnant to the 14th Amendment to the constitution of the United States, Section 1.

Article 14 of the amendments of the constitution of the United States provides, Sec. 1. * * * "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty or property without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."

The general rule as we have found it laid down in the authorities outside of this state, is that in actions to foreclose mortgages after the death of the mortgagors, their heirs are necessary parties defendant.

Lane et al vs. Erskine et al, 13 Ill., 501;

Harvey vs. Thornton, 14 Ill., 217;
Starke et al vs. Brown, 12 Wis., 572;
Zaegel vs. Kuster et al, 51 Wis., 31;
Johnson vs. Johnson (S. C.), 3 S. E., 606.

It has been held that even where the mortgagor retains an equitable interest only and the legal title is vested in the mortgagee, the heirs are necessary parties.

Frazier et al vs. Bean, Admr. (N. C.), 2 S. E., 159.

It is true that Section 369 of the Code of Civil Procedure authorizes an executor or administrator to sue without joining the heirs with him, but it does not authorize him to be sued without such heirs being joined, and Section 386 of the Code of Civil procedure, providing for the survival of actions upon the death of a party, declares: "In case of the death or disability of a party, the court on motion may allow the action or proceeding to be continued by or against his representative or successor in interest."

A similar provision was construed in the case of Zaegel vs. Kuster *supra* to mean "successor in interest," or where the title vested in the heir upon the death of the ancestor, that the heir must be made a party, but that it did not authorize an action against the executor or

administrator without the heir. It has been uniformly held in the State of California that where the mortgagor has parted with his title to the mortgaged premises, his grantee is a necessary party defendant and that as against him the mortgagee can acquire no right or title by a proceeding in foreclosure and a sale under a decree therein, unless such successor has been made a defendant in the foreclosure proceeding.

Goodenow vs. Ewer, 16 Cal., 461-468;
Boggs vs. Hargrave, 16 Cal., 559;
And numerous cases since following these.

If, instead of standing mute and inactive, the administrator of this ancestor had applied to a court of probate jurisdiction for an order to sell this same real estate to pay the mortgage debt, notice to the heirs would have been given as provided in Section 1538 of the Code of Civil Procedure, and they would have had the right to appear to make objection and have had their day in court. For Section 1539 provides that a copy of the order to show cause why such sale shall not be made, must be served personally on all the persons interested in the estate, if they be residents of the county, at least ten days before the day appointed for hearing the petition, or by publishing four successive weeks in such newspa-

per in the county as the court shall direct, and when the time appointed for the hearing arrives, the court must try the question as to whether the sale ought to be made. Section 1540, Code of Civil Procedure.

And yet, under Section 1582 of the Code of Civil Procedure this same administrator may simply stand idly by and suffer the suit of foreclosure to be instituted, and when it is so instituted against her alone she may make default, allow judgment and decree to be entered and the lands to be sold, even though, as in the present case, they be worth six or seven times the amount of the mortgage debt, and this shall forever preclude the heirs at law of the mortgagor.

As already urged, if the legislature intended by Section 1582 of the Code of Civil Procedure to empower a party who had by a contract with the ancestor, by which such ancestor had pledged the title of his land, to divest the heir who had taken such title by descent, of such title, without any proceeding whatsoever against such heir after the death of the ancestor; that is, if the legislature meant to provide that the creditor and mortgagee might, by a proceeding against the administrator alone, foreclose the right of the heir and under a decree to sell such land and so divest the heir of the title, then the legislature undertook to do

a thing which it has no power to do under the constitution of the state of California and which it is plainly forbidden to do by the express terms of the constitution of the United States.

We are aware of the fact that the federal courts have been very considerate in dealing with the process prescribed by the states. They have apparently been willing to treat almost any manner, or semblance even, of notice as being sufficient to meet the requirements of this constitutional provision; but they have not hitherto, nor is it possible to conceive that they will in the future, be satisfied where it is sought to deprive a party of his property without *any sort of notice or process* or a day in court, and that is precisely the fact of the present case. There is no pretense that any manner of notice was ever given to these heirs, the plaintiffs in error herein, or any proceeding to foreclose the mortgage executed by their ancestor. What did happen was that the mortgagee some years after the the death of the ancestor, instituted a suit to foreclose the mortgage, making as sole party defendant thereto the administrator, who made no appearance, filed no answer, took no steps whatsoever to protect the estate, whatever it may have been, which the law had invested in her, or that which the law had clearly

cast upon these children and heirs of the deceased ancestor. The record shows that a judgment was taken by default. That a decree was rendered without any interposition on the part of the administrator and a sale of the property was made and the defendant Lyall bought it in, paying therefor three cents more than the amount of the judgment, which was $871.91, while the land sold was of the value of $6000.00, or nearly seven times more than the debt.

Surely such proceeding as was here had can not be regarded as due process of law as respects the heirs of the intestate. It is true that the courts, and particularly this honorable Court, have been exceedingly cautious in attempting to define the meaning of the constitutional provision under consideration. Indeed they have refrained from laying down a definition. It is said by Justice Miller in the case of Davidson vs. New Orleans, 96 U. S., page 104, "But apart from the imminent risk of the failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on

which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining obligations of contracts, the regulation of commerce and other powers conferred on the federal government, or limitations imposed upon the state."

No doubt this is a wise caution, but upon one subject it may be said there has been no reticence or halting, either by the state or the federal courts. All these have agreed that this constitutional provision, whether found in the federal or state constitution, does guarantee "to every one the right to have notice of any proceeding by which his rights of life, liberty or property may be affected and to be afforded an opportunity to defend, protect and enforce such rights in the orderly proceeding adapted to the nature of the case."

10 Am. and Eng. Encyc. of Law, 2nd Ed., page 296, notes 3-4.

For the purpose of the case at bar this suffices, and it may be observed that numerous cases are cited under notes 3 and 4 as decided by the federal courts and by most of the state courts of the Union. We believe that no case can be found in support of a contrary view. Of course the "notice" required is such as is provided for the case of the class to which the

particular case belongs. That is to say, if the process prescribed by the law of the state in the particular class of cases is the writ of summons, the party is entitled to receive that sort of notice. If it be by posting up notice in a particular place or class of places, then such service will suffice. And the right of a person to such notice as is prescribed for the particular case implies also the right that the proceeding otherwise shall pursue the law in the particular class of cases. A mortgage can be foreclosed as against a party only by the institution of an action against that party; he must be made a defendant in the complaint. Until he is so brought into the record, no writ of summons may properly be issued against him, except in the case where he is sued by a fictitious name, and then he must be substituted in his right and proper name before the plaintiff can proceed to judgment against him that will have any binding effect upon his rights.

Plaintiffs in error were neither made parties to the complaint, nor was any process issued against them by any fictitious or other name. In short the contrary is not contended. The plaintiff contented himself with suing the administratrix alone. The judgment which was rendered was rendered against her solely. The very existence of the heirs at law was ignored

and no account taken of them at any stage of the proceedings. They therefore neither had "notice" nor "opportunity to be heard," both of which, as already suggested, are essential to jurisdiction of the person, and are essential in order that the proceedings shall bind such person. As to the necessity of notice we cite only a few of the very great number of cases in which this question has arisen and been determined:

Holden vs. Hardy, 169 U. S., 366;
Davidson vs. New Orleans, 96 U. S., 97;
Myers vs. Shields, 61 Fed. R. 713;
Iowa Cent. R. Co. vs. Ia., 160 U. S., 389;
Calhoon vs. Fletcher, 63 Ala., 574;
Mulligan vs. Smith, 59 Cal., 206;
Clark vs. Lewis, 35 Ill., 417;
Garvin vs. Dussman, 114 Ind., 429;
Highland vs. Brazil Block Coal Co., 128 Ind., 335;
Happy vs. Mosier, 48 N. Y., 313;
Gillman vs. Tucker, 128 N. Y., 190.

As to "Opportunity to be heard," the same cases in the United States Supreme Court, already cited, are referred to, and also the following:

Zaegler vs. South, etc. Ala. R. Co., 58 Ala., 599;
Brown vs. Denver, 7 Colo., 305;

Citizens Horse R. Co. vs. Belleville, 47 Ill. App., 388.

We quote a brief extract from the case of Brown vs. Denver, *supra*: "Whenever it is sought to deprive a person of his property or create a charge against it preliminary to or which may be made the basis of taking it, the owner must have notice of the proceedings and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed, must be given." The Supreme Court of California in Mulligan vs. Smith, 59 Cal., 207, says that the guaranty "extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature." The late Justice Bradley in the case of Davidson vs. New Orleans, 96 U. S., 97, observed that in judging what is due process of law respect must be paid to the cause and object of the taking, whether under the taxing power or the power

of eminent domain or the power of assessment for local improvements or none of these; and if found to be suitable or admissible in the special case, it will be judged to be due process of law; otherwise it will be held oppressive and unjust. While in the cases heretofore decided by the Supreme Court of California, holding that the administrator may be sued alone, little or nothing is said upon that subject, no doubt they rest upon the notion that such administrator by reason of his representative relation and capacity stands substituted for all the parties concerned. That is to say, he is the representative of the heir at law as well as of the creditor. There is a sense, no doubt, in which it is true that the administrator is the representative of the heir at law, but in the course of the administration of the estate, he is oftener the adversary of the heir, while he is always the representative of the creditor, and the Supreme Court of California has in more than one case held that the administrator and the heir are adversaries; as in all proceedings to sell the property of the intestate. If the administratrix of the intestate in the present instance had proceeded to sell the mortgaged property to pay the mortgage debt, as we have already seen, she would have been obliged to give the heirs notice and

the whole proceeding would have been in the nature of an adversary proceeding in which she would have been acting against the heirs, but it is insisted that because she did nothing, simply stood by and allowed the mortgagee to foreclose the mortgage, suffering a default in the action he had brought against her as sole defendant, she, in some mysterious way, was the representative of these heirs, their substitute, through whom and a judgment against whom they would be divested of the title, which had been cast upon them by the law of the land immediately upon the death of their father.

It will be observed that property is but one of the category of things or rights which this constitutional provision was intended to safeguard. The others are life and liberty. Therefore, so far as this provision is concerned, property is held just as sacred and the protection of its owner against deprivation thereof is as completely and rigorously secured, as are his life and liberty.

It would certainly be a startling proposition that a person might be deprived of his liberty and even of his life by a trial upon a charge of crime committed by him but made against another party as in some sort the substitute of the real alleged defendant, and that upon judgment and conviction in such trial the alleged

defender be deprived of his life or liberty.

We respectfully submit that the judgment in this case should be reversed and the statute in question held to be in contravention of the Federal Constitution, and we pray the judgment of the Court accordingly.

Respectfully submitted,

CYRUS F. MCNUTT,
MCNUTT & HANNON and
WM. G. GRIFFITH,
Attorneys for Plaintiffs in Error.

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No. 228

IN THE SUPREME COURT

OF THE

UNITED STATES

EDWARD QUIGLEY McCAUGHEY and GEORGE JOSEPH McCAUGHEY, minors, by their Guardian SUSAN McCAUGHEY, and ANN ELIZABETH McCAUGHEY and JOHN PETER McCAUGHEY,
Plaintiffs in Error,

versus

ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, EMMA J. FAULDING, MERVIN C. FAULDING, F. F. PIERCE and A. M. PIERCE,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

In Error to the Supreme Court of the State of California

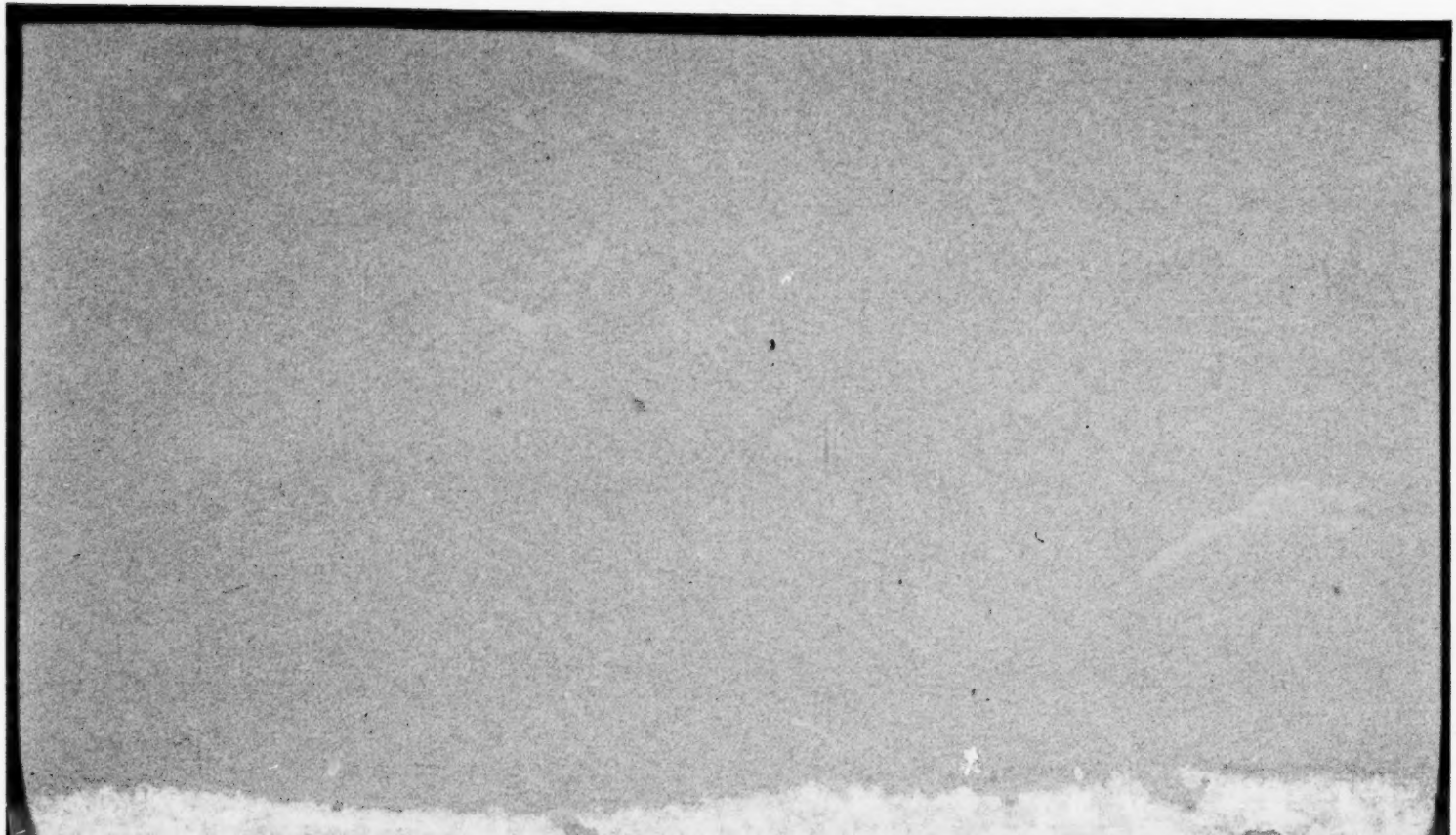
Alexander Lyall, *in Propria Persona.*
Santa Barbara, Cal

Filed _____ *1910.*

_____ *Clerk.*

By _____ *Deputy Clerk.*

C. S. CHILDRESS, PRINTER.



IN THE SUPREME COURT

OF THE

United States

EDWARD QUIGLEY McCAUGHEY and GEORGE JOSEPH McCAUGHEY, minors, by their Guardian SUSAN McCAUGHEY, and ANN ELIZABETH McCAUGHEY. *Plaintiffs in Error,* vs. ALEXANDER LYALL, H. J. FINGER, MAE MORTON, J. S. MORTON, EMMA J. FAULDING, MERVIN C. FAULDING, F. F. PIERCE and A. M. PIERCE. *Defendants in Error.*	BRIEF ON BEHALF OF DEFENDANTS IN ERROR

In Error to the Supreme Court of the State of California.

INTRODUCTION.

MAY IT PLEASE THE COURT:

The real merits of this cause have been before the Supreme Court of the State of California three different times by reason of three distinct appeals. See Finger vs. McCaughey, 119 Cal., 60; Pacific Reporter, Vol. 45, page 1004, and 152 Cal., 615.

The contention of plaintiffs in error is certainly deserving a better cause.

It is admitted by the brief of plaintiffs in error that there is but one point involved in the case, viz: That whether in an action to foreclose a mortgage in the State of California, where the mortgagor has died since the execution of the mortgage and an administrator has been appointed and qualified, is it sufficient to make the executor or administrator of the mortgagor's estate sole defendants, or is it necessary to make his heirs or devisees parties to such foreclosure suit? The Supreme Court of the State of California has held in an unbroken line of decisions that such heirs, devisees or legatees are not necessary parties in order that such heirs or devisees be bound by the decree of foreclosure in such an action. The latest of these decisions, so far as we can find, was in McCaughey vs. Lyall, 152 Cal., 615, in which Justice McFarland cites some of said decisions. Other decisions to the same effect are as follows

Collins vs. Scott, 100 Cal., 446;

Spotts vs. Hanley, 85 Cal., 167,

in which case the Supreme Court held (although the action was ejectment) that the administrator is in privity with and represents heirs and creditors.

De La Ossa vs. Oxarart, 88 Cal., 101.

In Dickey vs. Gibson et al, 121 Cal., 276, the Supreme Court say: "In an action to

foreclose a mortgage against an executrix of the will of the deceased mortgagor, the executrix represents the estate, and it is not necessary that the heirs be made parties thereto, but the judgment against the executrix binds the heirs and devisees."

This doctrine has been so long adhered to as to become and be a rule or law of real property in the State of California, and to hold otherwise would be to unsettle the title to a vast amount of real property in the State of California and other states where a similar law prevails. We quote from Foster's Federal Practice, 3rd Edition, Vol. 2, page 881:

"Where the decisions of the courts of a state have established a local rule of property, they will usually be followed by the Federal courts held within such state. The statute law of a state will always be followed by a federal court there held, so far as the statutes establish a local rule of property, and nearly always so far as they create or abolish rights as distinct from remedies.

"The construction of a statute by the courts of the state which enacted it will be followed by the federal courts, provided such construction is clear and was made before the facts occurred out of which the question for adjudication arose, and if, pending a writ of error or appeal, the highest court of the state gives

to the statute a different interpretation from that which seemed to prevail when the court below made its decision, the judgment or decree will ordinarily be reversed."

In support of the doctrine announced in the foregoing propositions, the learned author cites the following decisions of this court:

Neves vs. Scott, 13 How., 268;
Gaines vs. Fuentes, 92 U. S., 10;
Ellis vs. Davis, 109 U. S., 485;
Loman vs. Clark, 2nd McLean, 568;
McCloskey vs. Bar, 42 Federal Reporter, 609;
Bucher vs. Cheshire R. Co., 125 U. S., 555;
D'Wolf vs. Rabaud, 1 Pet., 476;
Clark vs. Smith, 13 Pet., 195;
Fitch vs. Creighton, 24 How., 159;
Brine vs. Insurance Co., 96 U. S., 627;
Mutts vs. Scott, 99 U. S., 25;
Van Werden vs. Morton, 99 U. S., 378;
Cummings vs. National Bank, 101 U. S., 153;
Holland vs. Challen, 110 U. S., 15;
Reynolds vs. Crawfordsville First Nat. Bank, 112 U. S., 405;

See Ankey vs. Clark, 148 U. S., page 34, in which this court said: "It would seem irresistibly to follow, that in the enforcement of a law common to the territory and to the

state, this court must in pursuance of the well settled rule, adopt the construction put upon the local statute by the highest court of the state."

This court said in the case of

Burgess vs. Saligman, 107 U. S., 20:

"Since the ordinary administration of law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."

See Bucher vs. Cheshire R. R. Co. et al, 125 U. S., 555, from which we quote as follows, to-wit: "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title thereto, they are to be treated as laws of that state by the federal courts."

See Bacon vs. N. W. Mut. L. Ins. Co., 131 U. S., 258, in which this court held that the court follows the construction of a statute by the highest court of the state, which is a rule of property in that state. Due process of law has been defined by this court to be its regular administration through courts of justice, by timely and regular course of proceedings to judgment and execution. As a rule it includes parties, regular pleadings and a trial according to the settled course of procedure.

Den vs. Hoboken etc. Co., 59 U. S., 272;
Rees vs. City of Watertown, 86 U. S., 107;
Pearson vs. Yewdall, 95 U. S., 294-6.

"Due process of law implies a legal proceeding under the direction of the court, intended to secure a trial according to the law of the land existing at the time of the vesting of the rights. See Barsons vs. Russell, 11 Mich., 113. Early in the history of this court it was held that the lands of a deceased debtor in the state of Georgia are liable in equity for the payment of his debts without making the heir a party to the suit."

See Telfair et al, Executors of Rea, and Sommerville, vs. Steads, Executors, 2nd Cranch, 405.

The principle involved in this case is clearly and fully analogous to that of the case at bar. The opinion is by Chief Justice Marshall and

is a model of brevity and clearness; it is as follows: "The only doubt which the court has was whether, by the laws of Georgia, the land could be made liable unless the heir was a party to the suit. We have received information as to the construction given by the court of Georgia to the statute of 5 Geo. 11, making lands in the colonies liable for debts, and are satisfied that they are considered as chargeable without making the heir a party."

Decrees affirmed. So far as we are able to learn, this decision has not been criticised or overruled; it most convincingly shows how clearly this court follows, in construing the statutes of a state, the decisions of the courts of last resort of such state in their construction of its statutes.

(See Carey vs. Roosevelt, page 5, Vol. 81, Fed., 608.)

Section 1582 of the Code of Civil Procedure of the State of California went into effect Jan. 1, 1873, and is one of the few provisions of that Code that the tinkering legislators have allowed to remain as it was enacted. This section had for its counterpart section 195 of the old practice act of the State of California, which was the law of practice and pleading in said state prior to the adoption of the Codes of said state. This section as construed by the Supreme Court of California has

become a law of real property in that state as indicated by Justice McFarland in deciding this case in the Supreme Court of California. (See McCaughey vs. Lyall, 152 Cal., 616.)

Where the law, for convenience in its administration, has furnished a representative of the interest in question, those so represented need not be made parties to the litigation. See Foster's Federal Practice, 3rd Edition, Vol. 1, Sec. 45. He says: "Thus, until they have distributed to them the decedent's estate, executors and administrators are deemed sufficiently to represent all legatees, creditors and next of kin in suits brought by or against them in their representative capacity." Mr. Jones in his valuable work on mortgages says: "In a state, under a statute by which the personal representatives of a decedent succeeds to the land as well as the personal estate, for the purposes of administration, the executor or administrator becomes the necessary party in the foreclosure of a mortgage, in place of the heirs." (See Vol. 2, Sec. 1414, page 415, 3rd Edition.)

The learned author cites the case of Harwood vs. Marye, 8 Cal., 580. This action was brought to quiet the plaintiff's title to one-half of the property described in the complaint. There is no averment in the complaint that the validity of the provisions of section 1582

of the Code of Civil Procedure is involved. This court said in Tracy, plaintiff in error, against Ginzberg etc., 205 U. S., 168: "The decision of a state court involving nothing more than the ownership of property with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law simply because its effect is to deny the claim of ownership in such property." This court in this case said: "Within the meaning of that amendment (14th Cons. of the United States), a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power inconsistent with those settled usages and modes of proceeding existing in the common law and the statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," citing Den, Ex. Dem. Murray, vs. Hoboken Land and Implement Co., 18 How., 272, and Bank of Columbia vs. Okely, 4 Whea., 235. It cannot be that the state court in this case by its final judgment departed from these usages or modes of proceeding. Certainly when state courts act upon and according to a statute that has been in force for more than half a century,

and upon their construction of such statute the titles of thousands of titles to real property repose, this court would certainly be very reluctant to hold such constructions erroneous and to conflict with the constitution of the United States. This court on a writ of error to a state court has not the jurisdiction of a general reviewing court in error, but is limited to a consideration of the specific denials of federal rights.

Waters-Pierce Oil Co., 214 U. S., 417.

See

Maiorano vs. Baltimore & O. R. Co. 214 U. S., 792;

Ober vs. Gallagher, 93 U. S., 199,

One of the clearest and most complete discussions of the point of law involved in this case is presented in the opinion in the case of

Hearfield vs. Bridges, Circuit Court of Appeals Ninth Circuit,

rendered June 8, 1896, and reported in Volume 21, Circuit Court of Appeals, page 212. The action in that case was, as in the case at bar, to quiet plaintiff's title to certain lands in the city of San Francisco. The opinion is clear and exhaustive of the subject, and contains the history of the sections of the Civil Code and the Code of Civil Procedure of California, involved in that case and also in the case at bar. And the opinion concludes as

follows, to-wit: "The law as thus declared by the highest court of the state, in respect to a rule of property within the state, is, as has been shown, binding on this court." This opinion is reported also in Volume 75, Federal Reporter, page 47.

As to the conclusive effect of judgments between federal and state courts, see notes to the case of

Union & Planters Bank vs. City of Memphis, Vol. 49 Circuit Court of Appeals, page 468.

Section 1581 of the Code of Civil Procedure of the State of California provides that "the executor or administrator **must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate.**" This section further provides, "For the purpose of bringing suits to quiet title, or for partition of such estates, the possession of the executor or administrator is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration as provided in this title." It is thus made apparent that the legislature of the State of California intended to and did invest in an executor or administrator of an estate full and complete power to represent all parties

interested in the estate in actions to foreclose mortgages executed by the decedent. The right of inheritance is a statutory right which in this state is subject to many conditions and limitations.

Section 1516 of the Code of Civil Procedure of the State of California provides that "all of the property of a decedent shall be chargeable with the payment of the debts of the decedent, the expenses of administration, and the allowance to the family, except as otherwise provided in this Code and in the Civil Code.

Section 1384 of the Civil Code of the State of California provides that "the property both real and personal of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purpose of administration." The heir, in the State of California, of an intestate's property takes by reason of the law and subject to all of the conditions and limitations of the law. He takes the property subject to the administration of the property and the payment of the debts of his intestate. If the same law provides that the administrator, as provided in said section 1582 of the Code of Civil Procedure, may be sued for the debts of the dece-

dent, he takes subject to that right. The mortgage of George McCaughey to H. J. Finger, mentioned in the record, was a lien upon the land—the allowance of the claim of H. J. Finger based on the note and mortgage created a lien on the land in the nature of a judgment—such is the effect of the allowance of a claim presented against an estate and allowed; that is to say, it is a judicial determination of the estate's indebtedness in a specified sum to a particular person. See

Estate of Hugh J. Glen, deceased, 74 Cal. 568.

Claims against an estate of a deceased person are allowed without notice or consent of the heirs or devisees of such an estate.

It is alleged in the complaint that the land sold was of the value of $6000.00, while the amount for which the land mortgaged was sold was $912.17. The statement that the land was of the value of $6000.00 is a great exaggeration. The plaintiff's complaint shows that the land was sold at public auction and to the highest and best bidder. The presumption is that every officer who had anything to do with the sale performed his duty. The right of redemption from such a sale exists for one year and may be enjoyed by the payment of the price for which the land sold, with one per cent per month thereon to date of

redemption. Surely, if the property was worth $6000.00, it would have been no trouble to have negotiated a loan on the property and redeemed it from the sale of which plaintiffs now complain. There are intimations in the complaint of negligence on the part of the administratrix of the estate of George McCaughey; if so, the remedy is not to set aside the sale, but against those who became her sureties as such administratrix. Before she received letters of administration she had to give bonds for the faithful discharge of her trust as such administratrix.

There is not anything in the record that shows that Alexander Lyall was not a purchaser in good faith. The reversal of the judgment on the first appeal in the case would not have affected Mr. Lyall's title and purchase. The judgment was not void. The court had jurisdiction. See

Chase vs. Christianson, 41 Cal., 253;
Gray vs. Dougherty, 25 Cal., 266;
Reynolds vs. Hosmer, 45 Cal., 628;
Roer on Judicial Sales, sec. 608;
Jones on Mortgages, 3d Edition, sec. 1647.

By virtue of section 387 of the Code of Civil Procedure of the State of California, in force before the action of Finger vs. McCaughey was begun and when it was commenced, provided that at any time before trial

any person who has an interest in the matter in litigation or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. And this intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is paid by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, and is made by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties of the action.

Thus the State of California provided an opportunity for these plaintiffs to have intervened and made the same plea in the action of Finger vs. McCaughey as they have made in the case at bar. It would seem that the law of laches would deprive the plaintiffs, if they ever had cause of complaint, to raise it after so long a lapse of time.

There is not any merit in this proceeding in this court, and if it be within the power of this court in addition to its affirmance of the judgment of the Supreme Court of the State of California, we ask that damages be awarded the defendant in error.

Most respectfully submitted,

ALEXANDER LYALL, *In Propria Persona.*

Received a copy of the within brief for the Judge who heard the cause, this day of October, 1910.

Clerk.

Service of the within brief is hereby admitted this day of October, 1910.

Attorney for Appellants.

McCAUGHEY *v.* LYALL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 228. Submitted April 19, 1912.—Decided May 13, 1912.

Section 1582 of the Code of Civil Procedure of California, as construed by the Supreme Court of that State, is not unconstitutional as denying due process of law to an heir of a mortgagor because it permits foreclosure against the administrator without making the heir a party to the suit.

The legislative power of the State is the source of the rights in real estate and remedies in regard thereto.

The highest court of the State can construe the laws of that State so as to make of them a consistent system of jurisprudence accommodating the rights and the remedies dealt with by the legislature.
152 California, 615, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Constitution of a statute of California, are stated in the opinion.

Mr. Cyrus F. McNutt, with whom *Mr. Wm. G. Griffith* was on the brief, for plaintiffs in error:

By § 1384, Civil Code of California, the property of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration.

The Supreme Court of the State held that upon the death of the ancestor, the title to the real estate vests immediately in the heir. *Bates* v. *Howard*, 105 California, 173, at 183; *Estate of Woodworth*, 31 California, 595, at 604; *Chapman* v. *Hollister*, 42 California, 462, 463.

While the legislature can provide that such heir shall take the estate subject to burden, such as the payment of the debts of the ancestor and support of his family for the time being, that is, during administration, *Brenham* v. *Story*, 39 California, 179–185, when the law of the State has established the right of the heir to take by descent and has provided that such descent shall be cast *eo instanti* at the death of the ancestor, his right is fixed by such positive law and he becomes invested of the measure of title which that law has fixed and he cannot be divested of such title without due process of law. See § 1582, Code Civ. Proc., as follows: Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators

in all cases in which the same might have been maintained by or against their respective testators or intestates.

This statute, which is the basis of the rule established by the court that the heir at law is not a necessary party defendant in an action for the foreclosure of a mortgage given by his ancestor during his lifetime, is repugnant to the Fourteenth Amendment.

The general rule is that in actions to foreclose mortgages after the death of the mortgagors, their heirs are necessary parties defendant. *Lane* v. *Erskine*, 13 Illinois, 501; *Harvey* v. *Thornton*, 14 Illinois, 217; *Starke* v. *Brown*, 12 Wisconsin, 572; *Zaegel* v. *Kuster*, 51 Wisconsin, 31; *Johnson* v. *Johnson* (S. C.), 3 S. E. Rep. 606.

This is so even where the mortgagor retains an equitable interest only and the legal title is vested in the mortgagee. *Frazier* v. *Bean, Admr.* (N. C.), 2 S. E. Rep. 159.

Plaintiffs in error were neither made parties to the complaint, nor was any process issued against them by any fictitious or other name. The plaintiff contented himself with suing the administratrix alone. The judgment which was rendered was rendered against her solely. The very existence of the heirs at law was ignored and no account taken of them at any stage of the proceedings. They therefore neither had "notice" nor "opportunity to be heard," both of which, as already suggested, are essential to jurisdiction of the person, and are essential in order that the proceedings shall bind such person. *Holden* v. *Hardy*, 169 U. S. 366; *Davidson* v. *New Orleans*, 96 U. S. 97; *Myers* v. *Shields*, 61 Fed. Rep. 713; *Iowa Cent. R. Co.* v. *Iowa*, 160 U. S. 389; *Calhoon* v. *Fletcher*, 83 Alabama, 574; *Mulligan* v. *Smith*, 59 California, 206; *Clark* v. *Lewis*, 35 Illinois, 417; *Garvin* v. *Dussman*, 114 Indiana, 429; *Highland* v. *Brazil Block Coal Co.*, 128 Indiana, 335; *Happy* v. *Mosier*, 48 N. Y. 313; *Gillman* v. *Tucker*, 128 N. Y. 190; *Zaegler* v. *South &c. Alabama R. Co.*, 58

Alabama, 599; *Brown* v. *Denver*, 7 Colorado, 305; *Citizens' Horse T. Co.* v. *Belleville*, 47 Ill. App. 388.

Mr. Alexander Lyall pro se and for other defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a judgment of the Supreme Court of the State of California sustaining the title of defendants in error to certain lands in that State derived through a sheriff's sale of the same upon suit for foreclosure of a mortgage. The suit was instituted and prosecuted against the administratrix of the estate of the father of plaintiffs in error, they not having been made parties nor given notice of pendency of the suit.

The facts, as stated in the opinion of the court, are as follows (152 California, 615, 616):

"George McCaughey died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime, on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for five hundred dollars, which was due and unpaid at the death of the decedent. After his death Susan McCaughey was duly appointed and qualified as administratrix of his estate. The note and mortgage were duly presented to the administratrix and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have

it adjudicated that they are the owners of an undivided one-half of the said land; that the claim of the defendants thereto be adjudged null and void; that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained; and plaintiffs declining to amend, judgment was rendered for defendants."

The judgment was affirmed by Department 2 of the Supreme Court and a petition for rehearing in banc was denied. Thereupon the chief justice of the court granted this writ of error.

The contention of plaintiffs in error is that the law cast upon them the title to the land upon the death of their intestate ancestor and that such title could not be divested in a suit in which they were not parties.

To sustain the contention plaintiffs in error make, as we shall see, one part of the law of the State paramount to another part, certain decisions of the courts of the State paramount to other decisions, putting out of view that necessarily the coördination of the laws of the State and the accommodation of the decisions of its courts is the function and province of the tribunals of the State, legislative and judicial respectively.

For their rights of property plaintiffs adduce § 1384 of the Civil Code of the State, which provides that "the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration." And decisions of the Supreme Court are cited holding, it is said, "that upon the death of the ancestor, the title to the real estate vests immediately in the heir." From the code and the decisions it is deduced that the descent being cast at the instant of the death of ancestor, the "right of the heir is

fixed by such positive law and he becomes invested with the measure of title which that law has fixed and cannot be divested of such title without due process of law."

It is admitted that the heir takes subject to administration, but with that limitation only, it being contended further that "he holds precisely the title held by the ancestor." Section 1582 of the Code of Civil Procedure of the State is cited as defining the limitation. It provides that "actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. *Cunningham* v. Ashley, 45 California, 485; *Bayly* v. *Muehe*, 65 California, 345; *Finger* v. *McCaughey*, 119 California, 59; *Dickey* v. *Gibson*, 121 California, 276. This is conceded by plaintiffs in error, but they say that because § 1582 of the Code of Civil Procedure "is made the basis of the rule established by the Supreme Court of the State " they complain of it, and respectfully urge that it "is repugnant to the Fourteenth Amendment of the Constitution of the United States, § 1." This is equivalent to saying that the legislative power of the State, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary. *Judgment affirmed.*